



## **In the Matter of an Application by Evelyn White for Judicial Review [2000] NI 432, [2004] NICA 1**

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## In the Matter of an Application by Evelyn White for Judicial Review

[2000] NI 432, [2004] NICA 1

20 April 2001

### **O'ROURKE LJ:**

#### *Introduction*

The appellant in this case, Evelyn White, is an elderly woman. In her lifetime, she has seen remarkable change in Northern Ireland. As a resident of the Garvaghy Road in Portadown, a site of some of the most entrenched and robust sectarian clashes in the jurisdiction, she has perhaps seen more than most of the darker side of life in Northern Ireland, even since the Belfast/Good Friday Agreement. Indeed, the clashes at the Garvaghy Road seem hopelessly immune to the broader more positive political developments in the jurisdiction. Evelyn White, given her position at the coalface of sectarian hostility in Northern Ireland at the time of this application, might reasonably have wondered 'what peace process?'

Evelyn White is, of course, at the centre of this case, although it is very easy to lose sight of her in more abstract discussions about 'the community' and what it means to be representative of that community and the symbolism and significance of parading to 'the community'. For parading did not have only symbolic significance to Evelyn White; it had the material power to dictate her daily movements and the movements of her family. Her daily experiences must have contrasted painfully with television images of landmark handshakes between formerly bitterly opposed political leaders, and media-friendly shots of international leaders and music stars celebrating the success of the peace agreement. Evelyn White's daily life, by contrast, consisted of helicopters constantly overhead, impeding her ability to sleep. Frequent blockades of her street meant that even accessing the most basic of foodstuffs was a challenge, not to mention the daily battles to keep younger family members indoors and away from clashes with police and protestors.

The contrast between the high-profile political events of Northern Ireland's public life, with the ongoing disruption to the constrained private life of the appellant, is a contrast that is lived by many people – and perhaps in particular by many women on the Garvaghy Road – in this jurisdiction. The depth of the disappointment, even despair, felt by the people of Portadown, the Garvaghy road residents and members of the Loyal Orders, that the achievement of a cross-party political agreement endorsed by popular referendum had done so little to dissipate the tension and violence of annual parading in Portadown must have been acute.

### *Proceedings to Date*

On 19 May 2000, Carswell J delivered judgment in a judicial review application by Evelyn White. Ms White had challenged the validity of the appointment by the Secretary of State for Northern Ireland of the members of the Parades Commission for Northern Ireland (the Commission). She sought a declaration that their appointment was unlawful, because the eventually constituted Commission contained no women members, which she claimed was a breach of the terms of the Public Processions (Northern Ireland) Act 1998 (the 1998 Act). Ms White is a resident of the Garvaghy Road area of Portadown.

Ms White challenged the validity of the appointments on a number of grounds. It was averred that the Secretary of State had failed to comply with his statutory obligation under paragraph 2(3) of Schedule 1, which provides that:

‘The Secretary of State shall so exercise his powers of appointment under this paragraph as to secure that as far as is practicable the membership of the Commission is representative of the community in Northern Ireland.’

It was also claimed that the Secretary of State had failed to take into account a number of relevant considerations and that the failure to appoint a woman constituted discrimination contrary to s 75 or 76 of the Northern Ireland Act 1998.

At the High Court, Carswell J indicated, obiter, that the obligation on the Secretary of State to appoint a Commission ‘representative of the community in Northern Ireland’ referred, in the context of parading, to the two sectarian blocks and not to the gender composition of the Commission. Further, on the practicability issue, because of the practical difficulties encountered and the need to appoint on merit and avoid religious imbalance, the Court held that the Minister took all steps open to him to make the Commission representative. In the circumstances, to appoint a Commission that included at least one woman would have required the appointment of a less qualified woman ahead of a better qualified man, which would have been unlawful. Finally, Carswell J rejected the argument that public commitments made by the Secretary of State that appointments to the Parades Commission would be consistent with the Guidance published by the Commissioner for Public Appointments gave rise to a legitimate expectation that this would be done.

The appellant appeals against that decision on a number of grounds. The principal arguments advanced by the appellant on the hearing of the appeal may be broadly summarised as follows: -

1. The judge erred in law by interpreting the obligation to be ‘representative of the community’ as referring only to the sectarian blocks,
2. The judge further erred in finding that the Secretary of State did everything ‘as far as practicable’ to ensure that the appointments were representative of the community,

3. The judge erred in holding that the Secretary of State had acted within his scope of discretion in approaching a man from outside of the appointable pool to fill the last seat of the all-male Commission.

*Does 'representative of the community' in the context of parading refer only to the two sectarian blocks?*

Although this question was dealt with only in obiter comments by the High Court, because of its relevance to the assessment of the practicability question, I will deal with this question first.

It is often remarked that, of the approximately 3000 parades that take place in Northern Ireland each year, it is only a small group which give rise to dispute. Notwithstanding the relatively small number of disputed parades, the scale of the dispute can be very serious. Consequently, the Parades Commission of Northern Ireland was established in 1997 and given statutory basis in 1998.

In the High Court, my honourable colleague Carswell J expressed the view that the term 'representative of the community' referred, in the context of parading, to the two main sectarian blocks. Regrettably, the basis for this belief was given little elaboration by the Court, but appeared to rely on select sections of the North Report, published in January 1997, which led to the enactment of the Parades Commission. The North Report was commissioned by the then Secretary of State to review the current arrangements for handling public processions and open-air public meetings and associated public order issues in Northern Ireland and to make recommendations. Chapter 12 of the North Report set out a series of recommendations to the Secretary of State:

'Recommended the creation of an independent body that would:

- (a) allow interested parties to put their views forward about proposed parades;
- (b) encourage them to settle difficulties locally, and where that proved impossible,
- (c) itself come to a view on what, if any, conditions should be imposed on contentious parades after an appropriately transparent process of examination of all the relevant issues against the background of reformed legal provisions,'

The composition of the proposed commission was accepted to be of critical importance to its success (para 12.31): it would need widespread acceptance, self-confidence and an ability in its members to work together. The report went on to state:

'The Parades Commission would need to have a geographical spread and both cross-community and gender balance.'

The review body's recommendation was accepted, and a commission was established on an informal basis in March 1997. In that year the police allowed the parade to process down the Garvaghy Road, but the area was effectively sealed off and residents were confined to their homes for a number of hours. Steps were then taken to give the commission formal recognition, and in February 1998 the Public Processions (Northern Ireland) Act 1998 was enacted. This established the commission as a body with a chair (or 'chairman', as the legislation stipulates) and up to 6 members. Its duties, expressed in section 2, were in part educational and advisory but included the promotion and facilitation of mediation as a means of resolving disputes about public processions. It was empowered under the same section to facilitate mediation between parties to particular disputes, to take such other steps as might be appropriate to resolve such disputes and to issue determinations in respect of particular proposed public processions. It was to issue a code of conduct for those organising or taking part in public processions or public meetings and to issue procedural rules and guidelines. Under section 8 it had power to impose conditions on those organising or taking part in proposed public processions, prescribing among other things the route to be followed. Criminal penalties attached to wilful breach of conditions imposed by the commission. Relevant for present purposes is paragraph 2(3) of Schedule 1 to the Act:

'The Secretary of State shall so exercise his powers of appointment under this paragraph as to secure that as far as is practicable the membership of the Commission is representative of the community in Northern Ireland.'

In the lower court, Carswell J indicated at page 440 that he was

'not altogether persuaded that the phrase 'representative of the community' in paragraph 2(3) of Schedule 1 to the 1998 Act was intended to mean that there should be gender balance, or at least some representation... The phrase in question does not refer to gender or to the make-up of the population of the Province. It refers specifically to 'the community', which in the context of parades is constantly used to demote the different sectarian blocks --- see, for example, the reference in paragraph 1.15 and 1.16 of the North Report to 'another part of our community' and 'the other part of the community', which are plainly references to the sectarian divide'.

Carswell J's interpretation of the meaning attached to the term 'community' in the North Report is based on a partial and selective reading of said report. Contrary to the assertion that community refers in the report to the sectarian blocks, 'community' is given many and varied meanings throughout the report. While there is indeed reference to 'the two parts of the community', 'communities' is also used in a plural sense to refer to the communities living in the various areas of contested marches in Northern Ireland (para 1.17), 'the various parts of the community' referring to more than two sides (para 1.38). Moreover, the Report recognizes internal diversity within different parts of the community ('some sections of the Nationalist part of the community have felt excluded from those discussions over their future', para 1.41). Throughout the Report, 'community' is frequently used to refer all individuals living in Northern

Ireland, that is one single community ('the community', passim). I do not agree, therefore, with my honourable colleague's reliance on the North Report to ground a belief that the reference to the community in the legislation refers only to the sectarian blocks. This is a question that merits further interrogation and reflection.

The appointments to the first Parades Commission were also the subject of judicial review on the grounds of 'representativeness'. *In the Matter of an Application for Judicial Review by Jane Elizabeth Armstrong* (Unreported. Belfast High Court, 3rd and 29th April 1998), it was argued on behalf of the applicant that two of the Catholic appointments were 'non-nationalist Catholics' and thus failed to provide an adequate counter-balance to the two loyalist appointees and thus the two Catholic appointees were not 'representative' of the community which they appeared to have been selected to represent. The application was ultimately unsuccessful, but the case raised the vital question of whether the term 'representative' implied that the Commission should be an exact mirror-image of society on political, religious, gender or geographical grounds. The judge held (in relation to the two catholic appointees) that 'representative of the community' was not necessarily achieved by choosing candidates to be pitted against one another. Rather, candidates should be representative of 'a wide spectrum and broad diversity'. Of further significance in this regard is the recognition by the North Report of the diversity of parades conducted each year in Northern Ireland. Relying on Royal Ulster Constabulary statistics, the Report notes that of the 1996 parades, 2404 were held by organisations identified as Loyalist, 230 by Nationalist organisations, and 526 by 'others', the latter designation referred to, for example, marches by guides and scouts and trade unions (para 3.1). The Report itself noted that 'there would be merit in there being a rather fuller breakdown of these categories, to reflect more fully the diversity of organisations and parades' (para 3.47). The North Report also dedicated extensive discussion to 'the views of other interested parties', recognizing that not just marching groups and residents had a stake in the issue and were impacted by parading disputes, for example peace constituencies and business people (6.18 – 6.30).

Contrary to High Court's determination that parading in Northern Ireland 'referred to the two Sectarian blocks', therefore, it is clear that there is much greater diversity evident in parading in the jurisdiction. While parading in Northern Ireland is typically regarded as a male activity, parades routinely include women. For example, a distinct women's organisation grew up out of the Orange Order. Called the Association of Loyal Orangewomen of Ireland, this organisation was revived in December 1911 having been dormant since the late 1880s. They have risen in prominence in recent years, largely due to protests in Drumcree. The women's order is parallel to the male order, and participates in its parades as much as the males apart from 'all male' parades and 'all ladies' parades respectively. The contribution of women to the Orange Order is recognised in the song 'Ladies Orange Lodges O!' There is considerable evidence of the operation of flourishing of the Association since the early 1900s. *Laws and ordinances (sic) of the Association of Loyal Orange women of Ireland* was published in 1888. Having become somewhat dormant thereafter, the

organisation experienced a revival in 1911 and has been active ever since. In addition to the Association of Loyal Orange Women of Ireland, there is also a Junior Orange Women's Association of Ireland. By the Orange Order's own figures, there are over 100 lodges of the Association of Loyal Orange Women, with over 2,500 members. Information on the gender profile of other groups and organisations engaged in parades (e.g. nationalist organisations commemorating the Easter Rising, or trade union marches to mark May Day) is unfortunately not as readily available, but a Ladies Ancient Order of Hibernians and a female auxiliary to the Ancient Order, known as the Daughters of Erin, are documented. There is little reason to believe that women are not present in significant numbers within those groups and organisations also.

Moreover, it is clear that women as well as men are impacted by decisions of the Parades Commission. Unlike my distinguished colleague in the High Court, I have had the advantage of seeing the exhaustive report of the Rosemary Nelson Inquiry before arriving at my determination in this decision. The report is instructive for several reasons, not least in capturing the exigent circumstances that form the backdrop to this judicial review, that is the profound disturbance to daily life posed by the contentious parades to all residents of Portadown, the extreme – often violent – hostility faced by the marchers, and the impact of this apparently local disturbance on political and public life throughout the jurisdiction. Indeed, the Rosemary Nelson inquiry Report noted that:

There were fears that Drumcree had the potential to derail the Peace Process. One senior Northern Ireland Office official told us: 'Drumcree had become a microcosm for political and other issues in Northern Ireland. If we were unable to resolve this issue, then a lot of other things could fall apart. Drumcree had shown its potential to act like a septic sore, poisoning Northern Ireland and damaging the political settlement process, with the risk of de-stabilising the Good Friday Agreement'. The Prime Minister was advised on 25 June 1998 that it was 'not impossible that Drumcree could lead to the collapse of the whole [Good Friday] Agreement' (para 7.6).

That the stakes were high in Drumcree in 1998 is a matter of public record. From these brief, though revealing, comments, it is surely clear that the subject matter of the Parades Commission is anything but a narrow sectarian matter. Rather, parading stands at the centre of the process to end Northern Ireland's three decades of violence and to secure a peaceful, democratic and inclusive political dispensation for the benefit of the entire community. Women are regular participants in parades. Moreover, women's daily lives, in particular in sites of contentious parades, are heavily shaped by decisions to permit, deny or re-route parades. Women have a fundamental interest in the operation, deliberation and effectiveness of the Parades Commission.

I conclude, therefore, that the judge erred in law in determining that, in the context of parading, 'representative of the community' referred only to the sectarian blocks. This question is not, however, determinative of the merits of the appeal. The Court must further consider whether the Secretary of State

operated within the scope of his discretion in failing to appoint any women to the Commission and whether he acted 'as far as practicable' to ensure the representativeness of the Commission.

*What is the scope of the Secretary of State's discretion to appoint?*

It was stated by the lower court, and is affirmed here, that the Secretary of State is afforded wide discretion by the Parades Commission Act schedule 2(3) in making appointments to the Commission. It is in my view clear that the statutory discretion given to the Secretary of State to secure that as far as is practicable the membership of the Commission is representative of the community in Northern Ireland gives him a wide discretion in relation to the interests which he can take into account. This demonstrates the diversity of interests which the Secretary of State is entitled to take into account and is consistent with the respondent's position that his decision is an evaluative judgment. I accept the respondent's argument that appointments to the Commission belong to a category of decisions where the threshold for judicial intervention is high. A large area of discretion is available to the decision-maker particularly because of the political content of the decision. It is the court's function only to ascertain whether the decider has taken into account the correct considerations and made the decision within the proper parameters by correct application of the law. The proper parameters of the Secretary of State's discretion are set out by the legislation:

'The Secretary of State shall so exercise his powers of appointment under this paragraph as to secure that as far as is practicable the membership of the Commission is representative of the community in Northern Ireland.'

It is evident, however, that the proper parameters of the Secretary of State's discretion were altered by the Secretary of State and erroneously affirmed by the High Court. Whereas the legislation refers to the qualified requirement for the appointments to be 'representative of the community', this was in fact interpreted to mean the achievement of 'religious balance' in the composition of the Commission. In both the submissions to the Court, and in the High Court's presentation of the legal issues to be addressed in the case, this altering of the terms of the Secretary of State's discretion is apparent. To draw on the High Court's dealing with this issue, when the recruitment process resulted in an uneven number of Catholic and Protestant members and no female members:

'The Secretary of State was then faced with the necessity to adopt one of several possible courses of action, none of which was ideal. He considered and rejected the following as undesirable, for the reasons set out against each:

(a) to go to the reserve list -- as the persons on this list were all Protestants, the appointment of one of them would have meant an undesirable *religious imbalance* in the membership of the Commission;



(b) to appoint a Catholic female who did not get on to the reserve list – he considered that it would be contrary to the requirements of the general law prohibiting discrimination on grounds of sex or religion to appoint a woman who was not as well qualified as those on the reserve list (and did not reach the merit threshold for the post) in order to maintain a *religious balance*;

(c) to put back the date on which the new Commission was to take up office -- there would then have been a period of indeterminate length when no Commission was in operation;

(d) to let the new Commission commence its work without filling the vacancy -- it would then have operated for a period with a *religious imbalance* until a suitable appointment could be made.'

From the submissions to Court and the reasoning of the lower court, it is clear that the Secretary of State and the High Court has substituted the qualified requirement of community representativeness with a requirement of 'religious balance'. The scope of the Secretary of State's discretion is wide, but he or she is not free to alter the terms (or proper parameters) of the statutory discretion. There is no judicial authority for so interpreting 'representative of the community'. Indeed, the authority that does exist is directly contrary to this narrowing of the 'representativeness' standard and instead interprets representative of the community to mean 'a wide spectrum and broad diversity' (*In re Armstrong*). The question remains as to whether the Secretary of State acted 'as far as practicable' to ensure that the Commission was representative of the community, where 'representativeness' is not reduced to meaning 'sectarian balance'.

*Did the Secretary of State act 'as far as practicable' to ensure representativeness?*

The under-representation of women is a stark fact of Northern Irish public life. Indeed, it was an issue specifically identified for redress in the Belfast/Good Friday Agreement, which guaranteed 'the right of women to full and equal political participation' (6.1), although this provision was not included in the Northern Ireland Act 1998 which gave legislative effect to the peace agreement. The irony is not lost on this member of the bench of this Court, as its first female appointment, to adjudicate on the lawfulness of the failure to appoint any women to the Parades Commission. While the recent years of the peace process and new institutions established by the Belfast Agreement have offered promise in many respects, the seeming immutability of the under-representation of women within public appointments in the jurisdiction persists. Indeed, the percentage of women in overall public appointments has in fact fallen since the signing of the Belfast Agreement. In 1998, 35% of the membership of public boards in Northern Ireland was made up of women; in 2000, that percentage had reduced to 32%.

Even compared to this unsatisfactorily low percentage of women in public appointments in the jurisdiction generally, the number of female applicants to the Parades Commission was particularly low. The term of office of the first chair and members of the Commission was due to expire on 18 February 2000. In October 1999 the Secretary of State put in train the process of appointment of a fresh set of members, to take up office on 19 February 2000 for a two-year term. Advertisements inviting applications for appointment were placed in the press in early October 1999, setting out the function of the Commission and the terms of appointment of the members. The advertisement described the skills required for membership of the Commission as: assessing/evaluating; decision-making; team working; and presentation. A total of 82 persons applied for membership of the Commission, of which 46, or 83%, were male and only 14, or 17%, were female. An interview panel considered the applications against the advertised criteria for appointment and shortlisted 23 candidates for interview, of whom three (13%), were female, thus further reducing the proportion of women under consideration. Further to interview, 16 candidates were deemed appointable, consisting of 13 Protestant males, one Catholic male, one Protestant female and one Catholic female, thus further reducing the proportion of women eligible for appointment to 12.5%. These 16 persons were ranked by merit, and the Secretary of State was recommended to appoint the first six. Those six persons consisted of four Protestant males, one Catholic male and one Catholic female. The reserve list, being the remainder of the 16 ranked persons, then consisted of one Protestant female and the rest were Protestant males.

The Secretary of State accepted the panel's advice and the Northern Ireland Office (NIO) approached the six persons selected. Initially all of them indicated their willingness to accept appointment, and arrangements were made to announce the composition of the new Commission. Three days before the announcement, the female appointee informed the NIO that she would not accept an offer of appointment. In the event, as established by the High Court, the Secretary of State decided that in the exceptional circumstances which had arisen that the NIO should approach a person directly who they judged met the necessary competences. On this basis, an existing male Catholic member of the Commission who had not applied for membership was approached but he declined to consider appointment. An approach was then made to Mr Peter Quinn, who had considerable experience in the context of the parades issue and had been a facilitator in talks concerning the Drumcree parade in 1998 and 1999. The Secretary of State met Mr Quinn personally on 7 February 2000 and Mr Quinn indicated that he would accept appointment.

The Secretary of State is enjoined by paragraph 2(3) of Schedule 1 to the 1998 Act to ensure that the membership of the Commission is representative of the community 'as far as practicable'. I concur with the interpretation of this requirement adopted by my honourable colleague Justice Carswell in the High Court. 'Practicable' is a more stringent standard than 'reasonably practicable', see, eg. *Gregson v. Hick Hargreaves & Co Ltd* [1955] 3 All ER 507, at 516, per Parker LJ. I concur with Carswell J's assessment that 'practicable' in many contexts 'means feasible, which is probably the nearest to a synonym for the term'. In line with Carswell J, I take notice of the judgment of Boreham J in

*Brookes v J & P Coats Ltd* [1984] 1 All ER 702 at 719g, where he was dealing with a factory occupier's statutory duty under section of the Factories Act 1961 to make effective and suitable provision to render harmless, so far as practicable, all such fumes, dust etc as might be injurious to health. He state in the course of his judgment:

'I take practicable in this context to mean a precaution which could be taken or undertaken without practical difficulty.'

In the present context, the obligation placed upon the Secretary of State to ensure the representative nature of the membership of the Commission is qualified by the provision that it is to be representative of the community as far as is practicable. Certain practical limits are placed by the small size of the Commission upon his ability to make the membership representative. The need to observe the merit principle in appointments constitutes another very important practical constraint.

The lower court's formulation of the Secretary of State's options as to appoint either 'a less qualified woman' or 'a better qualified man' is wrong on the facts and flawed on the law. The lower court erred in interpreting that the appointment of a less qualified candidate than those on the reserve list was the only option open to the Secretary of State if he wished to appoint a woman. In fact, when the public appointments process failed to deliver an equal 'balance' of Catholic and Protestant representatives, the Secretary of State and his officials chose to move entirely outside that process and to directly approach an individual, Mr Quinn, whom they considered desirable for the position and whose appointment would secure the desired sectarian 'balance' of the Commission. The respondents failed, however, to consider whether approaching a Catholic woman would be appropriate, in light of the absence of any women on the Commission. Once the Secretary of State moved outside of the appointable pool identified through independent assessment and the normal procedures of the Office of the Commissioner for Public Appointments (OCPA), he was not limited to choosing between only 'a less qualified woman' or 'a better qualified man' and the High Court erred in accepting this formulation of the respondent's options. Rather, the respondent was free to approach anyone judged to meet the necessary competences and furthered the objective of appointing a Commission that was 'representative of the community, as far as practicable'. Based on an erroneous interpretation of what constitutes 'the community' in the context of parading, and based on a flawed formulation of the options open to the Secretary of State, the respondents failed to consider approaching a Catholic woman to fill the sixth seat on the Commission.

No reasonable person, knowing of the importance of parading decision-making and the recognized value of including women in this decision-making, could have failed to consider approaching a woman in these circumstances in order to secure a Commission that is 'representative of the community'. The respondents do not appear to have considered whether a suitably qualified woman could have been identified and approached for the sixth position. They do not appear to have considered whether the activities and decisions of a body including no

women would command widespread acceptance among the general public. Had these matters been addressed, as in my opinion they plainly should have been, the conclusion would have been reached (and certainly should have been reached) that appropriate efforts were necessary to consider a suitably qualified woman for the final position on the Commission. It was one thing to ensure that the sectarian balance was maintained within the Commission, but quite another to fail to consider approaching a suitably qualified female candidate in the circumstances.

I consider therefore that the appointment process of the sixth member of the Commission was unlawful in that the Secretary of State's officials failed to take into account a material consideration as a result of which they failed to secure as far as was practicable that member of the Commission was representative of the community in Northern Ireland. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision. If there are matters so obviously material to a decision that anything short of direct consideration of them by a minister would not be in accordance with the intention of the Act they would constitute relevant considerations to be taken into account. I am satisfied that the decision of the Secretary of State was flawed because he relied on the absence of an appropriately qualified woman in the reserve pool as sufficient evidence to ground a belief that no such woman was available anywhere in the jurisdiction. A similar conclusion was not drawn from the absence of an appropriately qualified Catholic man in the reserve list. This was a matter so obviously material to the decision which was taken to appoint Mr Quinn that failure to take it into consideration was not in accordance with the contention of the 1998 Act. As a result, the Secretary of State was unable to comply with para 2(3) of Sch 1 of the 1998 Act whereby he was required to exercise his powers of appointment so as to secure that as far as was practicable the membership of the Commission was representative of the community in Northern Ireland.

In the context of appointments to the Parades Commission, the choice of six men and no women upsets the balance to such an extent as to render the membership of the Commission unrepresentative of the community. I cannot accept the proposition that if one appoints no women, yet nevertheless maintains a sectarian balance, one is securing as far as practicable a Commission which is representative of the community in Northern Ireland. I feel bound to conclude that the decision to appoint Mr Quinn, without giving due consideration to the appointment of a suitably qualified woman, was one which a reasonable Secretary of State could not have made if properly directing himself on the law, if seized of the relevant facts and it taking account of considerations which, in this context, he was bound to take into account. The appointment was therefore unlawful.

It is clear that the difficulty in appointing a suitably qualified female is linked to the small number of female applicants to the Commission. It seems reasonable to conclude that it was this particularly low number of female applicants to the Parades Commission that likely contributed to the perception that there were

few appropriately qualified women and the Secretary of State's judgment that his only option was to appoint 'a less qualified woman' or a 'better qualified man'. That the Secretary of State found it plausible that no suitably-qualified Catholic woman was available in Northern Ireland also raises profound questions about the qualification criteria attached to these appointments. While women are under-represented across public appointments in the jurisdiction (32%), the dearth of female applicants to the Parades Commission is striking (17%). In dealing with the police, the Loyal Orders, the Parades Commission, the Secretary of State and, indeed, this Court, the belief that all relevant decision-making is undertaken by men must have been powerful for the applicant and her associates. The High Court's determination that parading engages 'the sectarian blocks' and that the obligation on the Secretary of State is therefore to ensure 'sectarian balance' in appointments to the Commission no doubt further compounded a view of decision-making in parading as an exclusively male activity. The good work of non-governmental organisations in the jurisdiction such as Democratic Dialogue demonstrates that, while women are no less likely than men to be politically active, such as in the community and voluntary sector, women have much less access to political activities associated with power (Democratic Dialogue, *Power, Politics and Positionings*, 1996). The participation of women in parading throughout the jurisdiction and the impact of parading on the lives of women, at the same time as their exclusion from relevant decision-making is judged to be lawful, is another example of this dynamic. The murder of Rosemary Nelson, a lawyer prominent in legal action concerning parading, was a chilling and powerful message to women who sought to challenge this status quo of exclusively male decision-making. The applicant and her associates were no doubt constantly aware of robust, often violent, resistance to efforts by women to influence parading decision-making. This court cannot collude in the further marginalization of half of the population from the decision-making that shapes their lives by judging the respondent's behavior in this appointment process to be 'reasonable'.

The Code of Practice for Ministerial Appointments sets out that 'All public appointments should be governed by the overriding principle of selection based on merit' (2.2). Further, 'no one who has not been reviewed by an Independent Assessor should be listed' within the appointable pool (2.3). The principle of independent scrutiny is the second of the seven principles underpinning the Code of Practice. Merit is indeed the correct and fitting touchstone for all public appointments, but this Court cannot endorse an understanding of merit that permits the exclusion of the skills, knowledge and perspectives of women. Merit is not the antithesis of diversity, rather the principle of diversity is critical for securing a meritorious Commission. The Guidance further provides that, where circumstances arrive that are not covered by the Guidance, the Commissioner's Office should be consulted (1.6). In the High Court, Carswell J at page 440 appeared to give considerable weight to the fact that the Commissioner for Public Appointments gave her approval:

'She gave her approval to the method of appointment, stating that she was satisfied that the NIO had made every effort to ensure both that the

Commission was representative of the community, as far as was practicable, and had been appointed on merit.'

Having defended his actions on the basis that the appointments to the Parades Commission is not governed by the Commissioner for Public Appointments, the Secretary of State cannot now seek validation in having relied on the advice of that Office. It is the Court's view that it was due only to the erroneous interpretation of 'representative of the community' identified above that the Commissioner for Public Appointments arrived at this conclusion.

For the reasons elaborated above, the Secretary of State failed to ensure that the appointments to the Parades Commission were representative of the community, as far as practicable.

### *The Intervention of the Northern Ireland Human Rights Commission*

The intervention by the Northern Ireland Human Rights Commission (NIHRC) on behalf of the appellant has been the subject of some contention. While not the specific subject of appeal in this case, given the fledgling nature of the NIHRC and its nascent role in making interventions in judicial proceedings, I feel it necessary to comment on the High Court's treatment of the NIHRC written intervention. It is clear from his judgment that Carswell J did not consider the NIHRC's written submission, with its discussion of the relevant international treaties to which the UK is party, to add anything of consequence to address the specific issues before the court. In this case, the NIHRC's written submissions identified provisions of the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Political Rights of Women, relevant to the rights of women to political participation. This particular issue remains of considerable importance to society in Northern Ireland as a whole.

Even if the NIHRC's intervention does not affirm the position of one of the parties, such a role will have been adjudged by the Commissioners as important for securing the role of human rights in Northern Ireland. For the appellant in this action in particular, challenging as she is the exclusion of women from public decision-making, the fact of the NIHRC's intervention and the provides a powerful reassurance that official bodies take these claims seriously. However frustrating some of my colleagues might find an element of generality in submissions before the Court, this is a small price to pay for the societal benefits thereby secured. I would therefore disagree with, and indeed deplore, any effort to disparage the role of the NIHRC in bringing to the Court's attention to the international legal commitments of the UK in this regard.